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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE: DA VINCI SURGICAL ROBOT ANTITRUST LITIGATION	)	Lead Case No: 3:21-CV-03825-AMO
	)	
THIS DOCUMENT RELATES TO:	)	<b>PLAINTIFFS' REPLY IN FURTHER</b>
ALL ACTIONS	)	<b>SUPPORT OF THEIR MOTION TO</b>
	)	<b>AUTHORIZE CLASS NOTICE AND</b>
	)	<b>APPOINT NOTICE ADMINISTRATOR</b>
	)	
	)	Date: March 5, 2026
	)	Time: 2:00 PM
	)	Courtroom: 10
	)	The Honorable Araceli Martínez-Olguín

1           Crediting Intuitive’s arguments for delaying class notice would be “a bit like permitting  
 2 a fox, although with a pious countenance, to take charge of the chicken house.” *Eggleston v.*  
 3 *Chi. Journeymen Plumbers’ Loc. Union No. 130, U.A.*, 657 F.2d 890, 895 (7th Cir. 1981).  
 4 Intuitive feigns concern for the members of the Class in an effort to delay resolution of this  
 5 trial-ready case. For the reasons stated below and in Plaintiffs’ opening brief, the Court should  
 6 order dissemination of class notice now, not delay it until after the Ninth Circuit’s decision in  
 7 *Surgical Instrument Service Co. v. Intuitive Surgical, Inc.* (No. 25-1372).

8           Intuitive requests that the Court defer class notice pending resolution of the *SIS* appeal,  
 9 which could take well over a year. The prejudice to class members of such a delay is obvious,  
 10 as Intuitive’s alleged monopolistic abuse is ongoing and will continue until it is enjoined. And  
 11 yet, Intuitive fails to cite a single case staying notice to a certified class for a pending appeal in  
 12 a different case—let alone an appeal of a non-dispositive merits issue.

13           The *SIS* appeal has no relevance to the timing of class notice. That appeal pertains to  
 14 jury instructions and claim elements. Those merits issues have no bearing on class certification  
 15 here, and regardless of how the appeal is decided, no corrective notice would be necessary.  
 16 Intuitive’s agreement to the content of the proposed notices, which include no language about  
 17 the *SIS* appeal, effectively concedes as much. However the *SIS* appeal is resolved, its impact  
 18 will be felt equally by all class members, whether they opt out or not. What is more, the basis  
 19 of the *SIS* appeal—the “lock-in” jury instruction—likely will not even arise in this case (and  
 20 certainly will not be dispositive) no matter how the Ninth Circuit rules. The Court should  
 21 therefore reject Intuitive’s delay tactics and permit issuance of notice “promptly after the  
 22 certification order is issued.” Ann. Manual Complex Lit. § 21.311 (4th ed.).

23       **I. Courts generally issue notice promptly after class certification, and Intuitive cites**  
 24       **no authority supporting a different approach here.**

25           Intuitive admits, as it must, that “it is commonplace for class notice to issue shortly after  
 26 a class has been certified,” Intuitive Resp. at 2, Dkt. No. 354; *see also* 7AA Wright & Miller,  
 27 Fed. Prac. & Proc. Civ. § 1786 (3d ed.) (notice should generally issue “as soon as the court  
 28 determines that a class action is proper”). Prompt notice protects the rights of absent class

1 members who do not know their claims are in litigation but who are entitled to this information  
2 under Rule 23.

3 Unsurprisingly, then, staying notice to a certified class is exceptionally rare. It happens  
4 only when an unresolved issue threatens to nullify the content of a notice form or to de-certify  
5 the class altogether. All six cases Intuitive cites to support a stay of notice hew this line:

- 6 • *Tschudy v. J.C. Penney Corp.*, No. 11-CV-1011, 2015 WL 5098446, at \*6 (S.D. Cal.  
7 Aug. 28, 2015) (emphasis added) (citations omitted) (staying notice for a class definition  
8 dispute):

9 Any further delay in this case is regrettable, but notifying the class before  
10 class issues are settled is likely to result in unnecessary costs and ‘may  
11 result in **multiple notices** and thus create confusion for potential class  
12 members.’

- 11 • *Wamboldt v. Safety-Kleen Sys., Inc.*, No. 07-CV-884, 2007 WL 2600735, at \*1-2 (N.D.  
12 Cal. Sept. 10, 2007) (staying class notice for summary judgment motions):

13 The court agrees with defendant that it failed to recognize [a] distinction  
14 [that would have affected summary judgment] . . . . All aspects of this  
15 case shall [therefore] remain stayed until the court resolves the motion  
16 for reconsideration and for summary judgment.

- 16 • *Cardoza v. Bloomin’ Brands, Inc.*, No. 13-CV-1820, Dkt. No. 178 at 2, (D. Nev. Dec.  
17 19, 2014) (staying notice to a *conditionally certified class in an FLSA action*—not a  
18 certified Rule 23 class—for renewed motions to dismiss and decertify):

19 [T]he court finds that it is in the best interests of all parties and judicial  
20 economy to resolve the pending 12(c) and decertification motions before  
21 the notice process begins and the parties incur the tremendous related  
22 expense . . . . [T]he court is mindful that the timing of these requests  
23 otherwise suggests a motive of delay . . . . [D]efendants are strongly  
24 cautioned that they should continue preparing the class-member-contact  
25 information, which they should have nearly ready now.

- 25 • *Guippone v. BH S&B Holdings LLC*, No. 09CV-1029, 2011 WL 1345041, at \*8  
26 (S.D.N.Y. Mar. 30, 2011) (staying notice for a summary judgment motion):

27 Usually when a court grants a motion for class certification, there follows  
28 a period when notice is prepared and transmitted to the class, and  
members are given an opportunity to opt out of this action. However,  
[because of an unresolved dispositive factual issue,] . . . I direct that the  
giving of class notice be stayed pending the court’s ruling on any motion  
that defendant Holdco may bring for summary judgment.

- 1 • *Hamilton v. Am. Corrective Counseling Servs., Inc.*, No. 05-CV-434, 2007 WL 1395592, at \*2 (N.D. Ind. May 10, 2007) (emphasis added) (staying notice for a summary judgment motion):

3 Delaying class notice at this time, until the pending motions for summary  
4 judgment have been resolved, will give the parties time to resolve this  
5 dispute. When the pending motions for summary judgment are resolved,  
6 it may be clear to both parties that certain contentions regarding **the  
content of the class notice are either moot or lack merit . . . .**

- 7 • *Bally v. State Farm Life Ins. Co.*, No. 18-CV-4954, 2020 WL 3035781, at \*5 (N.D. Cal. June 5, 2020) (emphasis added) (staying notice for a Rule 23(f) appeal challenging class certification):

9 The Court agrees that premature notice risks harm to class members who  
10 are likely to be confused **if certification is reversed.**

11 The through line of these cases is that the goal of prompt class notice can be outweighed  
12 by the risk of confusing class members and wasting resources if a corrective notice is likely to  
13 be needed later. *But that risk is not present here.* Whatever the outcome of the *SIS* appeal, the  
14 class will remain certified, and there would be nothing to correct in the content of the agreed-  
15 to notices.

16 At best, Intuitive’s proposed delay might let class members consider their opt-out rights  
17 with the benefit of somewhat more nuanced insight into what the class—or any opt-out  
18 plaintiff—will need to prove at trial. But even *that* possibility assumes absent class members  
19 will learn of and monitor the *SIS* appeal, which is not mentioned in the notice forms, and then  
20 independently assess its implications in this case. Withholding notice for that kind of abstract  
21 “benefit” to the class misses the purpose of Rule 23(c)(2), which is “to ensure that the plaintiff  
22 class receives notice of the action *well before the merits of the case are adjudicated.*”  
23 *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) (emphasis added). All the relevant  
24 considerations support prompt notice in this case, and the Court should therefore follow  
25 standard practice and order notice to proceed.

1     **II. Whatever the Ninth Circuit’s ruling, the “lock-in” instruction issue is ancillary here.**

2           Even if the case law supported staying notice for a pending merits appeal in a separate  
3 case, a stay would be unwarranted here because the Ninth Circuit appeal on the *SIS* case’s “lock-  
4 in” jury instruction concerns, at most, a peripheral, non-dispositive issue in this matter.

5           First, the Ninth Circuit—which is not operating under the extraordinary time pressure  
6 of trial and which has the benefit of appellate briefing and numerous amici—may well reject  
7 Intuitive’s position on the *Kodak/Epic Games* lock-in test. There is ample precedent to suggest  
8 that lock-in is not, as Intuitive suggests, an essential element in any case that involves an  
9 aftermarket, but rather that it offers an *alternative* way to prove market power if the defendant  
10 lacks power in the foremarket. *See, e.g., Eastman Kodak Co. v. Image Tech. Svcs., Inc.*, 504  
11 U.S. 451, 472–78 (1992). The Federal Trade Commission’s amicus brief to the Ninth Circuit  
12 in the *SIS* case underscores this point: “There is no need for such proof [of ‘lock-in’] when the  
13 defendant has market power in the foremarket[.]” FTC Amicus Brief at 1, Dkt. No. 52.1,  
14 *Surgical Instrument Serv. Co. v. Intuitive Surgical, Inc.*, No. 25-1372 (9th Cir. Aug. 6, 2025).  
15 The antitrust law professors’ amicus brief does too: “The *Epic* factors apply to claims of  
16 aftermarket monopolization only where the defendant lacks monopoly power in the foremarket,  
17 not where, as in this case, the defendant has a monopoly in the foremarket.” Antitrust Law  
18 Profs. Amicus Brief at 3, Dkt. No. 34.1, No. 25-1372 (9th Cir. July 30, 2025). In this case,  
19 Plaintiffs can easily prove Intuitive’s near-100% monopoly in the foremarket for MIST Robots,  
20 so, if the Ninth Circuit accepts the views of the FTC and leading legal scholars, there could be  
21 no possible “benefit” to the class from delaying notice.

22           But even if the Ninth Circuit accepts Intuitive’s proposed rule, Plaintiffs still could  
23 prevail without needing to satisfy the *Kodak/Epic Games* test. The test Intuitive advocates  
24 would apply only when plaintiffs define a relevant “aftermarket” in terms of a single brand, *i.e.*,  
25 a relevant market comprised entirely of products or services used only with a single seller’s  
26 primary product. But here, Plaintiffs can establish Intuitive’s market (and monopoly) power  
27 without defining the relevant aftermarkets that way, because Intuitive still has monopoly power  
28 even if the relevant markets include *all* MIST Robot instruments and repair services. Thus, even

1 if Intuitive prevails in the *SIS* appeal, that outcome would *not*: (1) be dispositive of this case;  
 2 (2) affect class certification; (3) fundamentally alter class members' claims; or (4) affect their  
 3 claims differently depending on whether they opt-out or stay in the class. Delaying notice to  
 4 wait for the Ninth Circuit to clarify the application of the lock-in test therefore would offer  
 5 nothing new or useful to class members to make a more informed decision about opting out,  
 6 while prejudicing class members by unduly delaying resolution of their claims against Intuitive.

7 **III. Intuitive's new "authorized third-party" argument is baseless.**

8 Finally, Intuitive briefly mentions a new "authorized third-party" defense it has raised  
 9 in the *SIS* appeal as another reason to delay notice to the class here. Intuitive claims that, if the  
 10 Ninth Circuit affirms based on a finding that SIS failed to introduce sufficient evidence that  
 11 Intuitive's claimed "third-party authorization process" was a sham, that affirmance "could  
 12 affect the entire foundation of Plaintiffs' antitrust claims." Intuitive Resp. at 2, Dkt. No. 354.  
 13 That argument is baseless.

14 Setting aside that, like "lock-in," Intuitive's new "authorized third-party" defense is  
 15 nowhere mentioned in the proposed notices, it also relies on an evidentiary record that does not  
 16 bind Plaintiffs. For purposes of Plaintiffs' case, it does not matter whether Intuitive may have  
 17 been able to leverage limited evidentiary rulings in the *SIS* trial to suggest that Intuitive  
 18 "authorized" Rebotix and Restore to sell refurbished EndoWrists while shielding from the jury  
 19 that its "authorization process" consisted of: (a) being sued by Rebotix and Restore for antitrust  
 20 violations, (b) litigating those cases until the eve of trial, and (c) settling the cases by paying  
 21 undisclosed amounts of money in exchange for commitments from those companies to  
 22 complete a burdensome—and legally unnecessary—regulatory approval process before  
 23 competing again in the relevant market. Plaintiffs will have their own opportunity at trial to  
 24 introduce sufficient (and abundant) evidence that Intuitive's claimed "third-party authorization  
 25 process" was a sham. *See, e.g., Rosa* Dep. 152:13–153:2, Dkt. No. 267-20 (admitting that  
 26 Intuitive did not have an "agreed-to" authorization policy for EndoWrists before March 2023).

27 Thus, however Intuitive intends to employ this new defense at Plaintiffs' trial, the Ninth  
 28 Circuit's evaluation of it in the context of the *SIS* trial record cannot be dispositive of Plaintiffs'

claims—nor even sufficiently relevant to be included in the Intuitive-agreed notices—and therefore does not warrant staying notice to the certified class. At most, issues relating to this defense should be the subject of a motion *in limine* in this case.

#### IV. Conclusion

For the foregoing reasons and those in their opening brief, Plaintiffs respectfully request that the Court grant their motion for approval of the proposed Notice Plan and order dissemination of the class notices as soon as the notice provider is in a position to do so.

Dated: December 19, 2025

Respectfully submitted,

/s/ Daniel P. Weick

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